No. 14,324

IN THE

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

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STATEMENT OF JURISDICTIONAL FACTS.

Appellee is a corporation incorporated under the laws of the State of Delaware, (T.R. 4) and that appellants, save and except Joseph DeAngelis, are citi-

zens of the State of California (T.R. 13), and the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. (T.R. 13.)

STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court of the United States, Northern District of California, Northern Division, awarding damages to appellee in the sum of $3386.25, plus interest and costs, resulting from the return by the appellants, and acceptance by appellee of certain machinery theretofore sold by appellee to appellants. The complaint, Par. IV, (T.R. 5), which was the charging paragraph, recited the purchase of the machinery by appellants for the sum of $13,545.00, and that "Defendants (Appellants herein) did thereafter offer to return to the Plaintiff said machinery, and the Plaintiff did agree to accept the return of said machine upon payment by the said Defendants of the sum of $3386.25. That on or about the 22nd day of February, 1952, the said Defendants herein returned to Plaintiff the said machine, but ever since have failed and refused to pay the said *Plaintiff* the sum of $3386.25 . . ."

Defendants' denial, Answer, Par. II, (T.R. 7) joined issue.

Paragraph III of the findings of fact, (T.R. 13) adopted the allegation of said complaint, holding that appellants did, in fact, on or about the 22nd day of February, 1952, return the machine and agreed to pay

the sum of $3386.25 to appellee. Paragraph II of the conclusions of law (T.R. 17) contains this language:

> "That the said Defendants herein did agree to pay and became indebted to the said Plaintiff herein for the sum of $3386.25 as of the 22nd day of February, 1952."

The following points are involved:

1. That the findings of fact and conclusions of law in the particulars noted upon which the judgment is grounded are not supported by the evidence;

2. That there was but one contract of sale between the parties, and that, upon breach thereof by the buyer (appellant), the seller's (appellees) remedy was limited to a pleading and proof of damages resulting from the failure of the buyer to retain and pay for the subject matter of such sale;

3. That, in law, there was no second or subsequent contract between the parties wherein, or otherwise, the seller could unilaterally assess a penalty or liquidated damage, and that, a judgment, grounded upon findings of fact and conclusions of law contrary thereto finds no support in the evidence or in law.

STATEMENT OF FACTS.

Defendants, DeAngelis Coal Company, et al., purchased from plaintiff, The Sharples Corp., two machines known as Sharples Super-D-Canter PY-14 Centrifuges and agreed to pay for each of said

machines the sum of $13,545.00. Shipment of the first centrifuge was received by defendants on December 10, 1951. This machine was assembled, tested for many weeks, but was found not to give satisfactory results. The performance obtained by defendants did not approximate prior laboratory tests upon which the contract was predicated. Therefore defendants, upon subsequent receipt of the second centrifuge, left it crated and on February 22, 1952, after the operation had continued in an unsatisfactory manner for over two months, stated to plaintiff that the machine would have to be returned. Plaintiff replied on March 5, 1952, to the effect that there would be a 25% "cancellation charge" upon return of the crated centrifuge. As stated in correspondence on that date, (Plaintiff's Exhibit No. 7, TR pp. 38-39), such "cancellation charge" by plaintiff was to reimburse plaintiff for "irrecoverable costs" in the manufacture of the unit in question. No other justification for the charge has at any time been made.

Defendants next communicated with plaintiff on March 14, 1952, (Plaintiff's Exhibit No. 8, TR pp. 40-41) to the effect that the matter would be taken under advisement pending further correspondence between the parties.

On March 20, 1952, the centrifuge was sent by defendants to plaintiff with freight charges prepaid by defendants. On April 14, 1952, defendants wrote plaintiff that "we definitely will not accept this service charge, as your equipment failed to perform as

your laboratory guaranteed." (Plaintiff's Exhibit No. 10, TR pp. 42-43.)

On April 17, 1952, a postcard from plaintiff acknowledged receipt of the centrifuge in question. (Defendants' Exhibit D, TR pp. 46-47.) Since that date defendants have refused to pay plaintiff any consideration for the attempted rescission of the contract of sale. Since that date plaintiff has had complete ownership of said centrifuge.

Defendant has made full payment for the first Super-D-Canter even though such machine has been of no discernable value to defendant.

ARGUMENT.

I. PLAINTIFF'S COMPLAINT WAS FATALLY DEFECTIVE IN NOT HAVING PLEADED, NOR FURNISHED PROOF THEREOF, OF DAMAGES RESULTING FROM THE FAILURE OF DEFENDANTS TO ACCEPT AND PAY FOR THE GOODS SOLD FROM PLAINTIFF TO DEFENDANTS.

It is a cardinal principle of the law that damages resulting from breach of a contract of sale must be both alleged and proved. Plaintiff has alleged the sale of the machine, known as a Sharples Super-D-Canter PY-14 Centrifuge, to defendants and has acknowledged return of it without any payment being made by defendants. However, plaintiff's complaint is totally devoid of any allegation of resultant damage because of defendants' attempted rescission of the contract of sale.

The machine in question was never uncrated by defendants. After many bona fide attempts by defendants to make advantageous use of the first delivered centrifuge, it became apparent to defendants that successful laboratory tests, upon which the sale of the machine had been predicated, could not be approximated. It therefore became necessary for the defendants to return the crated centrifuge. Freight charges for its return were assumed by the defendants.

The Sharples Super-D-Canter is a standard article catalogued for sale by the plaintiff. (TR p. 123, line 8.) Plaintiff did not allege what disposition was made of this standard article upon its return. If plaintiff was able to resell the machine in question at its quoted price, could there be resultant damage to plaintiff because of the attempted rescission of the contract of sale?

Plaintiff has attempted to explain the "cancellation charge" of 25% of the purchase price of the unit which it prays to exact as an amount necessary to reimburse plaintiff for "irrecoverable costs" in its manufacture. (TR pp. 38-39.)

> ". . . upon receipt of your firm order, we proceeded to manufacture this unit, and we experienced irrecoverable costs. It is our expectation that you will reimburse us for these costs, and this is the basis of the cancellation charge of 25%. The charge of 25% is somewhat less than our normal charges in cases of this nature, and I assume you will find it acceptable, . . ."

Such costs in the manufacture of a standard item, even if alleged and proven, are not properly includable in the determination of the measure of damages.

> ". . . No person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, . . ."
>
> *Calif. Civil Code,* Section 3358.

II. THE CORRECT MEASURE OF DAMAGES FOR BREACH OF A CONTRACT OF SALE IS THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE MARKET PRICE OR CURRENT PRICE AT THE TIME OR TIMES WHEN THE GOODS OUGHT TO HAVE BEEN ACCEPTED.

Damages are awarded in actions for breach of a contract to give the injured party benefit of his bargain and, in so far as possible, to place him in the same position he would have been in had the promissor performed the contract.

> *Calif. Civil Code,* Section 3300;
>
> *Coughlin v. Blair,* 41 Cal. 2d 587, 262 P. 2d 305 (1953).

This time-worn rule as to the recovery of damages from the breach of a contract of sale is exact as well as fair and practical in its application. A seller of goods is thus protected against loss if the prospective buyer will not accept or retain such items and therefore further sale is necessitated.

III. CONTRARY TO THE FINDINGS OF FACT AND THE CONCLUSIONS OF LAW REACHED BY THE LOWER COURT, DEFENDANTS DID NOT CONTRACT WITH PLAINTIFF AS OF THE TWENTY-SECOND DAY OF FEBRUARY, 1952, OR AT ANY OTHER DATE, TO INCUR A 25% "CANCELLATION CHARGE" INCIDENT TO RETURN OF THE UNIT IN QUESTION.

The finding of a contract incident to return of the centrifuge has neither support in law nor the facts as found. A chronological review of relative correspondence between the parties is necessary at this juncture:

2/22/52—Defendants wrote plaintiff that the centrifuge would have to be returned and asked permission to do so.

3/5/52—Plaintiff replied that a 25% "cancellation charge" would be exacted.

3/14/52—Defendants next communicated to the effect that the matter would be taken under advisement pending further correspondence.

3/20/52—The centrifuge was sent by defendants to plaintiff with freight charges prepaid.

4/14/52—Defendants stated that "we definitely will not accept this service charge as your equipment failed to perform as your laboratory guaranteed."

4/17/52—Plaintiff acknowledged receipt of the centrifuge.

Plaintiff has alleged and the lower Court found an original offer on the part of defendants to return the unit as of February 22, 1952. They then find an ac-

ceptance of the offer by plaintiff as of March 5, 1952, with the resultant contract.

TR p. 13—Findings of Fact—III:

> ". . . That thereafter the said defendants did offer to return to the plaintiff herein one of said machines, and the said plaintiff did agree to accept the return of said machine upon payment by the said defendants herein of the sum of $3,386.25. . . ."

TR p. 14—Findings of Fact—V:

> ". . . That it is true that the said machine was accepted and received solely and only upon the condition, agreement, and understanding of the defendants herein that the defendants would pay to the said plaintiff herein the sum of $3,386.25 aforementioned and no other. That the said defendants did so return said machine, and the said plaintiff did so accept said machine solely and only upon the aforesaid agreement, contract, and understanding that the said defendants would pay the said sum to the said plaintiff herein."

TR p. 17—Conclusions of Law—II:

> "That the said defendants herein did agree to pay to and became indebted to the said plaintiff herein for the sum of $3,386.25 as of the 22nd day of February, 1952."

If there had been an original offer by defendants on February 22, it was clearly rejected by the counter-offer by plaintiff. When the offeree purports an acceptance of an offer but modifies the terms of the original offer in any way or adds terms thereto, there

is in reality and law a counter-offer expressed by the offeree and the original offer is rejected.

Calif. Civil Code, Section 1585;

Bartone v. Taylor-Benson-Jones Co., 119 C.A. 2d 79, 258 P.2d 1054 (1953).

Therefore, clearly no contract could have been evolved out of the negotiations up to this point as one of the four requirements to an enforceable contract of law is mutual assent.

Calif. Civil Code, Section 1550.

It is not possible to find nor did plaintiff allege or the lower Court find, the formation of any contract to pay the "cancellation charge" from subsequent activities of the parties. Defendants' letter of March 14, 1952, was clearly not an acceptance of plaintiff's counter-offer. It stated:

TR pp. 40-41:

> ". . . In response to your letter of March 5th, we wish to advise that we will keep a direct answer in abeyance pending an exchange of correspondence between our respective offices.
>
> "You can expect to hear from us within a short time. . . .
>
> "In any event, we will write you in detail as soon as possible. . . ."

Plaintiff therefore, as offeror, was clearly notified that his offer had not been accepted and would only be, if at all, after the conclusion of further correspondence between the parties.

Without any further correspondence, defendants returned the machine to plaintiff who accepted said

unit and acknowledged receipt of same on April 17, 1952. Prior to such receipt, defendants wrote plaintiff on April 14, 1952:

TR pp. 42-43:

> ". . . It is indicated in one of your recent letters that if we were to return this equipment we would have to pay a 25% service charge. We wish to advise you that we definitely will not accept this service charge, as your equipment failed to perform as your laboratory guaranteed. . . ."

Therefore, plaintiff, upon receipt of the unit, had either received defendants' letter of the 14th of April, 1952, which clearly rejected the purported offer by plaintiff, or defendants' letter of the 14th of March, 1952, which made any acceptance contingent on further correspondence between the parties. In either event it cannot be claimed that a contract had come into existence. Plaintiff, upon receipt and retention of the unit in question, had notice of this fact.

Nor did the act by defendants in returning the unit constitute an acceptance of plaintiff's purported offer. Generally in the law of contracts there is a presumption that an offer invites a bilateral contract—a promise for a promise.

Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026 (1934);

Restatement, Contracts, Section 31, (1932).

It is quite clear from the record that plaintiff was inviting defendants to enter into a bilateral contract —requesting a promise from defendants to pay a

"cancellation charge" but nowhere in the record can an acceptance by defendants be found.

The general rule is well established that if the offeror calls for a promise, contemplating a bilateral contract, there must be an expression or communication of acceptance in order to constitute a contract.

Calif. Civil Code, Section 1565;

Restatement, Contracts, Section 52.

No exception to this rule is applicable here.

IV. EVEN IF THE TWENTY-FIVE PERCENT CANCELLATION CHARGE HAD BEEN INCORPORATED IN THE CONTRACT OF SALE, IT COULD NOT BE IMPOSED UPON DEFENDANTS AS IT IS A PENALTY UNDER THE GUISE OF LIQUIDATED DAMAGES.

The law as to a liquidated damage clause in a contract of sale is quite clear. To be legally effective, such a clause with its remunerative terms must have been fairly arrived at by the parties and damages for the breach of the contract must have been extremely difficult of ascertainment by independent judicial study.

Calif. Civil Code, Section 1670.

"Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Calif. Civil Code, Section 1671.

"The parties to a contract may agree therein upon an amount which shall be presumed to be

> the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."
>
> *Electrical Products Corp. v. Williams,* 117 C.A.2d Supp. 813, 256 P.2d 403 (1953), and cases cited therein.

If such a "cancellation charge" had been predetermined by the parties and incorporated within the contract of sale, there is no doubt but what the lower Court would have demanded a showing by plaintiff that damages were incapable of being otherwise accurately ascertained. If defendants had agreed to such a "cancellation charge" in the contract of sale, they would have been given an opportunity to show that the so-called "cancellation charge" was merely a penalty and thereby plaintiff would have had to allege and prove any damage.

What if the "cancellation charge" unilaterally imposed by plaintiff had been 50% or 75% of the purchase price? Are all buyers who find it necessary to return goods to be subjected to such a charge? The general common law rule is codified in California Civil Code, Section 3359, as follows:

> "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

CONCLUSION.

It is respectfully submitted that:

1. If appellees are to recover at all they must rely upon an action for damages for the breach of the contract to purchase the machine. In such an event they must plead and prove actual damage, the measure of damage being the difference between the contract price and the reasonable value of the machine at the time of the breach.

2. There was no separate independent contract of February 22, 1952, upon which appellees could ground an action.

3. The judgment represents a penalty under the guise of "liquidated damages" contrary to law and reason.

4. The judgment should be reversed.

Dated, Jackson, California,
February 4, 1955.

Respectfully submitted,
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